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No. 83-52

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

GERALD F. and DELORES TAYLOR,

PETITIONERS,

vs.

THE LAWSON MILK COMPANY and ROBERT A. DIXON,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY BRIEF OF PETITIONERS

Robert C. Paxton II
88 East Broad St. #1590
Columbus, Ohio 43215
614/221-3006

COUNSEL FOR PETITIONERS

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STATEMENT OF THE CASE

REPLY OF PETITIONERS

Because of the seriousness of the omissions and misstatements contained in the brief of The Lawson Company ("Respondent") which bear directly on the case of Gerald F. and Delores Taylor ("Petitioners"), this Reply is required.

First, the Supreme Court will take notice that Respondent does not contest the seven "armed robberies" that took place at its store in Columbus, Ohio. The only contention (an issue of fact) is when the said robberies occurred, viz. in daylight or darkness.

Second, Respondent makes a misrepresentation when it is stated that "no customer was ever wounded or injured in any prior armed robbery." To reflect this misrepresentation, Appendix A speaks for itself in this regard.

Third, Respondent does not advise this Court that absolutely no additional security measures were taken whatsoever to protect the unsuspecting business invitee from April, 1975 through June 28, 1979, notwithstanding seven armed robberies. Petitioners arged from day one that this fact (no additional security measures) was an "issue of fact" for resolution by the jury, not summary judgment.

Fourth, Respondent misrepresents the fact wherein it is stated that an affidavit from the criminal himself (Robert A. Dixon) took away from the "trier of fact" the culpability of Dixon with respect to the criminal act. In fact, the record clearly reflects that Petitioners filed two affidavits with the trial court raising as an "issue of fact' the physical and mental condition of Dixon prior to the shotgun blast that permanently crippled Petitioner Gerald Taylor.

Finally, Respondent would have the Supreme Court believe that Petitioner failed to comply with the requirements of Rule 56 and otherwise did not put in issue every fact raised by said Respondent regarding this bizarre case for resolution by the jury. If there ever was a Seventh Amendment violation, this case is the forerunner.

SUMMARY OF ARGUMENT
REPLY OF PETITIONERS

The Seventh Amendment to the United States Constitution clearly prohibits the disposition of lawsuits by summary judgment when an issue of fact exists. Fidelity and Deposit Company of Maryland v. United States, 187 U.S. 315 (1902). In the present case, Petitioners clearly raised an "issue of fact" for resolution by the jury under § 344, Restatement of Torts 2d, where it was alleged in several amended complaints that Respondent occupied the business premises for a business purpose, knew, or in the exercise of ordinary care, should have known that criminal acts of third persons would again occur, and with such knowledge, failed to take any steps whatsoever to protect the business invitee from that known danger. Other than the standard literature sent out to all Lawson stores in 1975, Lawson took no additional steps at this particular Lawson store and yet, Petitioners' case was not permitted to go to the "trier of fact".

Respondents' assertion that Petitioners failed to raise a Federal question at the first available time is totally unfounded. So long as a Federal question was actually considered and decided by the state court, it has been held that the Supreme Court will not inquire how and

when the question was raised below. Manhattan Life Insurance Company v. Cohen (1914), 234 U.S. 123. In addition, a Federal question may be raised in the pleadings. Magwire v. Tyler (1869), 75 U.S. 650. A Federal question may be raised in objection to the court's disposition of the case and in posttrial motions. Manley v. Park (1903), 187 U.S. 547. In the case at bar, Petitioners asserted, from day one, that the trial court took from them their right to a trial by jury.

ARGUMENT
REPLY OF PETITIONERS

I. THE SEVENTH AMENDMENT TO THE FEDERAL CONSTITUTION PROHIBITS A STATE COURT FROM RENDERING SUMMARY JUDGMENT IN A NEGLIGENCE CASE WHEREIN THERE ARE GENUINE ISSUES OF FACT FOR DETERMINATION BY THE TRIER OF FACT.

As early as 1902, this Court clearly espoused the Rule of Law that a state may not deprive an individual of his right to a trial by jury in a civil action. In Fidelity and Deposit Company v. United States, supra, this Court stated at page 320 the following Rule, applicable to the facts at bar: "If it were true that the rule deprived the plaintiff in error of the right of trial by jury, we should pronounce it void without refer-

ence to cases." Also see Oglesby v. Terminal Transport Company, Inc., 543 F.2d 1111 (Fifth Circuit 1976); Diamond Door Company v. Lane-Stanton Lumber Company, 505 F.2d 1199 (Ninth Circuit 1974); and United States v. Stangland, 242 F.2d 843 (Seventh Circuit 1957).

In each of the above cases, the rationale underlying the same is that if a "disputed issue of fact exists, one is entitled to a trial by his peers.

In the case at bar, Petitioners allege a duty, breach of duty, proximate cause and injury. Accordingly, it was for the jury to determine whether Respondent, who admittedly took absolutely no preventive measures, exercised reasonable care in the performance of its duty to safeguard Petitioners from the criminal acts of third persons. At page 6 of Respondent's brief it is stated: "The prior robberies were not disputed by Respondent. . .". Nor was it disputed that Respondent took no steps in light of seven armed robberies to protect the business invitee from the acts of third parties. In the case at bar, Petitioner, Gerald F. Taylor, was the victim of the eighth armed robbery and was permanently injured by a shotgun blast as a result thereof. How this case did not present an "issue of fact" for the trier of fact is absolutely beyond imagination. Petitioners were denied their right to a trial by jury.

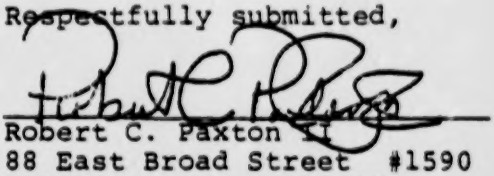
Unless the Supreme Court reviews this case on appeal, the Rule of Law in Ohio will permit the

business owner wider lattitude in recklessly disregarding the rights of his business invitee. To again appreciate the fact raised in several amended complaints that were disposed of by summary judgment, this Court must again review the "undisputed facts below".

DATE	CRIMINAL OFFENCE
01/12/76	Armed Robbery
10/20/76	Armed Robbery
11/19/76	Armed Robbery
04/02/78	Armed Robbery
02/11/79	Armed Robbery
02/22/79	Armed Robbery
05/14/79	Armed Robbery

If a business owner can stipulate the above track record and further stipulate that it took no additional measures to prevent another armed robbery, then we are in a sad state of affairs. It is absolutely essential that this Court permit this appeal in order that, on the merits, this matter will be remanded to the trial court for resolution on the merits.

Respectfully submitted,



Robert C. Paxton II
88 East Broad Street #1590
Columbus, Ohio 43215
614/221-3006

Counsel of Record for
Gerald F. and Delores Taylor,
Petitioners